U.S. Department
of Transportation

Federal Railroad Administration

Administrator

**1120 Vermont Ave., NW.
Washington, DC 20590**

JUL 17 2000

The Honorable William 0. Lipinski
U.S. House of Representatives
Washington, D.C. 20515

Dear Congressman Lipinski:

Thank you for your recent letter concerning Federal preemption in the area of locomotive whistle bans, You requested the Federal Railroad Administration's (FRA's) legal opinion on whether State or local whistle bans are preempted by either the general preemption provision (49 U.S.C. § 20106) of the Federal railroad safety laws or the specific statutory provision (49 U.S.C. §20153) requiring the FRA to issue rules requiring the use of locomotive horns at grade crossings.

For the reasons set forth below, we conclude that neither Federal statute preempts whistle ban laws adopted by a State or by a local community pursuant to a State law authorizing such a local action, except for such State and local laws in Florida, which were preempted by a 1991 FRA Emergency Order. However, we believe section 20106 preempts any local ordinance related to railroad safety that has not been adopted under the authority of a specific State law authorizing its adoption.

The General Preemntion Provision of the Railroad Safetv Laws

When enacting the Federal Railroad Safety Act of 1970 (FRSA), Congress included a specific preemption provision, now codified as section 20106. That provision sets out the following framework for determining when State requirements are preempted:

> *A State* may adopt or continue in force any law, regulation, or order related to railroad safety *until the Secretary of Transportation prescribes a regulation or issues an order covering the subject matter* of such State requirement. A State may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety when the law, regulation, or order-
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> (1) is necessary to eliminate or reduce an essentially local safety hazard;
> (2) is not incompatible with a law, regulation, or order of the United States Government; and
> (3) does not unreasonably burden interstate commerce.

49 U.S.C. §20106 (emphasis added).

This framework establishes two levels of inquiry. First, upon identification of the "subject matter" of the challenged State rule, the question is whether FRA has taken affirmative or negative action "covering" that subject matter (i.e., whether FRA has occupied it, in whole or in part, either (i) by regulation or order, or (ii) by an agency decision, such as a policy statement or termination of a proposed rulemaking proceeding, that for a particular subject matter no rule or restriction is appropriate or necessary as a matter of rail safety). See CSX Transp. Inc. v. Easterwood, 507 U.S. 658 (1993); Ray v. Atlantic Richfield Co., 435 U.S. 151, 178 (1977); Napier v. Atlantic Coast Line R.R., 272 U.S. 605 (1926).

The Supreme Court has held that the term "covering the subject matter" requires more than that the federal rule "touch upon" or relate to the subject matter of the state requirement. The Court held that preemption will lie only if federal regulations "substantially subsume" the subject matter of the relevant state law. See Easterwood, 507 U.S. at 664-665. If FRA has not so acted and if the State rule does not unduly burden interstate commerce, there is no further inquiry, and the State rule stands "until" FRA does so act to "cover the subject matter."

Once FRA is found to have acted so as to "cover the subject matter" of the State rule, the inquiry passes to the second level: the State rule (by hypothesis "an additional or more stringent" one) is enforceable only if it satisfies a three-pronged test: (i) it is necessary to eliminate or reduce an essentially local safety hazard; (ii) it is not incompatible with any Federal rule; and (iii) it does not unreasonably burden interstate commerce.

Courts have generally concluded that Congress's use of the word "State" in section 20106 was purposeful and that, accordingly, that section does not permit local governments to regulate railroad safety under the limited exceptions to preemption applicable to certain State action. CSX v. Plymouth, 86 F.3d 626 (6th Cir. 1996); and Donelon v. New Orleans Terminal Co., 474 F.2d 1108 (5th Cir.), cert. denied, 414 U.S. 855 (1973).

Application of Section 20106 in the Whistle Ban Context

FRA has not issued a rule covering the subject matter of the use of train horns, i.e., the subject of when railroads must or must not use their locomotive horns at highway-rail grade crossings. However, FRA has issued an emergency order addressing whistle bans in Florida. In 1991, FRA issued Emergency Order No. 15, 56 Fed. Reg. 36190 (1991), requiring the Florida East Coast Railway Company (FEC) to sound its locomotive horns at public crossings. FRA took this action specifically to preempt a Florida statute that permitted local whistle bans. FRA had done a study indicating that FEC's nighttime grade crossing accident rate had increased 195 percent after whistle bans were imposed. In its order, FRA indicated that the emergency action would preempt the Florida statute and the local ordinances adopted pursuant to that State law, which applied only to the FEC. FRA has also issued a rule, 49 C.F.R. § 229.129, requiring that locomotives be equipped with audible warning devices, but not requiring their use.

On January 12, 2000, FRA issued a proposed rule, 65 Fed. Reg. 2230 (2000) that, when FRA

issues it as a final rule, will implement the Congressional mandate in section 20153 (discussed below) to require railroads to sound their horns at all public grade crossings, unless certain exceptions apply. FRA's proposed rule contains a provision (section 49 C.F.R. § 222.5) stating the preemptive effect the rule will have under section 20106. FRA has explained in its preamble to the proposed rule the preemptive effect the agency believes its final rule will have:

> Accordingly, all existing local ordinances and state statutes relating to whistle bans or to the sounding of locomotive horns at public highway-rail crossings will be preempted by this regulation unless such ordinances or laws fall within the [local safety hazard] exception contained within 49 U.S.C. 20106. This rule, however, does not confer authority on localities to establish quiet zones if state law does not otherwise permit such actions.

65 Fed. Reg. 2242. This passage makes clear that FRA does not believe general preemption has yet occurred.[1]

We conclude that FRA has not covered the subject matter of whistle bans generally, but has covered the subject matter of whistle bans in Florida under its 1991 order. FRA did not intend by its 199 1 order to implicitly preempt State or local laws outside of Florida, as indicated by the precise language the order contains concerning its preemptive reach. We also conclude that section 229.129 does not cover the subject of whistle bans (i.e., prohibition of the use of locomotive horns), but instead covers the subject matter of equipping locomotives with audible warning devices. Accordingly, except for Florida laws, we do not believe that section 20106 preempts State laws concerning whistle bans or local whistle ban laws adopted pursuant to those State laws. However, because section 20106 generally preempts local safety laws not adopted pursuant to a specific State enabling statute, we believe that such local laws imposing whistle bans are preempted.

Federal case law strongly supports our conclusions. See, e.g., Southern Pacific v. Public Utility Comm'n of Oregon, 9 F.3d 807 (9th Cir. 1993) (Oregon statute allowing whistle bans between 10 p.m. and 6 a.m. at crossings with gates, flashing lights, and audible protective devices not preempted by 49 C.F.R. $229.129); South Bend v. Conrail, 974 F.2d 1340 (7th Cir. 1992); *unpublished opinion,* slip op. at 1992 U.S. App. LEXIS 21091 (1992) (Indiana law requiring

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[1] Section 20106 says that preemption occurs when FRA "prescribes a regulation or issues an order." Taken very literally, this language could arguably be read to bring about preemption at the moment a rule or order is issued. However, we think Congress more likely intended that preemption occur no sooner than the date a rule takes effect. Otherwise, because there is usually a gap between the issuance and effective date of a rule, the result would be a period during which neither the State nor the Federal requirement was in effect. We also believe that FRA can, in issuing a rule or order, specify when it intends for preemption to occur. This is especially true where, as in the case of the whistle ban legislation, Congress has expressly directed the agency to describe the preemptive effect of the rule under section 20106 when it issues the rule.

sounding whistles but providing exception that local governments could prohibit whistles with permission of State DOT not preempted); and Norfolk Southern Ry. v. Hapeville, 779 F.Supp. 601 (N.D.Ga.1991) (local ordinance, which prohibited sounding of whistles except in case of emergency, was preempted because only states, not political subdivisions thereof, can act under 49 U.S.C. §20106).

Preemptive Effect of Section 20 153

Under 49 U.S.C. §20153, Congress has mandated that FRA "prescribe regulations requiring that a locomotive horn shall be sounded while each train is approaching and entering upon each public highway-rail grade crossing." The statute also permits FRA to except from this mandate entire categories of railroad operations or crossings under certain conditions. The proposed whistle ban rule referred to above is FRA's proposed response to this mandate.

We do not believe that Congress intended this statute to have any preemptive effect on State or local ordinances. Instead, we believe Congress was fully aware of the preemptive effect the final rule would have under the general preemption provision of section 20106. The text of the statute makes this intent clear. Section 20153(h) requires that FRA include in its rule issued pursuant to this section "a concise statement of the impact of such regulations with respect to the operation of section 20106 of this title (national uniformity of regulation)." In other words, Congress clearly intended that preemption in this subject area will occur as a result of the issuance of the final rule and in accordance with the terms of section 20106. Congress asked that FRA describe that impact in its final rule. Congress would not conceivably have included this provision if it thought its enactment of section 20153 had any preemptive effect.

Further evidence of this absence of preemptive intent is the requirement in section 20153(i) that, in issuing its rule, FRA take into account the interest of communities that "have in effect restrictions on the sounding of a locomotive horn at highway-rail grade crossings." This subsection clearly contemplates that some communities will have whistle bans in effect at the time FRA issues its rule, which would not be possible if enactment of section 20153 had preempted those restrictions.

We do not believe that section 20153 has any preemptive effect and are not aware of any court that has reached a contrary conclusion. In fact, in a case involving a State statute mandating the sounding of horns (as opposed to banning their use), a Federal appellate court has pointed out that Congress's requiring FRA to issue a rule on the sounding of horns at crossings is not the same as covering the subject matter. UTU v. Foster, 205 F.3d 851, 862 (5th Cir. 2000).

Preemptive Effect of the Locomotive Inspection Act

In addition to administering the FRSA, FRA administers a number of railroad safety statutes originally enacted prior to 1970. The Locomotive Inspection Act (LIA), now codified at 49 U.S.C. §§ 20701-20703, is one of those statutes. The Supreme Court has said that the scope of

the LIA "extends to the design, the construction and the material of every part of the locomotive and tender and of all appurtenances." Napier v. Atlantic Coast Line R.R., 272 U.S. 605, 611 (1926). State or local laws on any of those subjects are completely preempted by the LIA.

However, whistle ban laws or laws requiring the use of locomotive horns that do not require that locomotives be equipped with horns or in any way dictate which horns shall be installed on locomotives are not, in our view, preempted by the LIA. We believe that those laws concern the use of certain devices and not their design or presence on a locomotive. Courts have generally agreed with this analysis. See, e.g., Southern Pacific; Foster; and South Bend, all cited above.

Conclusion

We believe that, until FRA has issued its final rule concerning the blowing of locomotive horns at grade crossings, States (except Florida) are free to regulate that subject matter, and local communities are free to enact whistle bans pursuant to such State laws. However, absent a State statute authorizing such a local ban, we believe such local laws are preempted.

We hope this letter sufficiently addresses the legal issues you raised. Of course, FRA's views on these issues are not binding on the courts that may ultimately have to resolve them.

Sincerely,

S. Mark Lindsey
Chief Counsel